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Supreme Court, U.S.
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No. 04-69

In the Supreme Court of the United States

AGNES BERNARDO, et al.,

Petitioners,

v.

PLANNED PARENTHOOD FEDERATION OF AMERICA. et al.,

Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of California

PETITIONERS' REPLY BRIEF

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I. Bernardo's Petition Concerns Vitally Important Federal Questions.

PPFA's assertion that Bernardo's Petition challenges evidentiary rulings made by the courts of California, see Response at 2-3, is wholly untenable. Bernardo does not challenge the evidentiary rulings made by the courts of the State of California; and she does not ask this Court to reverse the application of C.C.P. §425.16 based on her evidentiary showing. Bernardo's Petition asserts that the statutory standards set forth in C.C.P. §425.16 violate rights guaranteed to her by the United States Constitution.

Under these circumstances, there is no question that Bernardo's Petition is properly before this Supreme Court of the United States. "Interpretation of the law and the Constitution is the primary mission of the judiciary when it acts within the sphere of its authority to resolve a case or controversy." *Legal Services Corporation v. Velazquez*, 531 U.S. 533, 545 (2001). Bernardo has set forth the basis for her claims because, as this Court has explained:

> the reaches of the First Amendment are ultimately defined by the facts it is held to embrace, and we must thus decide for ourselves whether a given course of conduct falls on the near or far side of the line of constitutional protection....[W]e are obliged to make a fresh examination of crucial facts...so as to assure ourselves that th[is] judgment does not constitute a forbidden intrusion....

Hurley v. Irish-American Gay, Lesbian And Bisexual Group of Boston, 515 U.S. 557, 567 (1995) (citations omitted); *see also Bose Corp. v. Consumers Union,* 466 U.S. 485, 499-511 (1984)(*de novo* review applies to bench and jury decisions). Thus it is nonsensical for PPFA to argue that Bernardo's Petition is nothing but a challenge to evidentiary findings. Bernardo's Petition presents vitally important questions of federal law, *i.e.*, whether the use of C.C.P. §425.16 to strike her

claims and impose liability for fees and costs violated her constitutional right to petition, right to due process of law, and her right to the equal protection of the law.

A. Right To Petition

PPFA's effort to avoid Bernardo's claim based with reference to "baseless" litigation and "fee-shifting" must be rejected. Bernardo claims no absolute right to petition regardless of merit; her Petition concerns the substantive law standards and procedural protections that must be used to determine whether litigation is baseless (and can therefore provide the basis for liability) given that the fundamental right to petition is protected by the First Amendment.

By its terms C.C.P. §425.16 is wholly inconsistent with the protections for petitioning set forth in this Court's precedent. This Court has emphasized that "the lawsuit must be objectively baseless in the sense that no reasonable litigant could realistically expect success on the merits," *see Professional Real Estate Investors*, 508 U.S. at 60, 65; But Bernardo's claims were struck pursuant to C.C.P. §425.16 on the theory that she had not shown a "reasonable probability of success," and even though her showing is plainly sufficient to show that "similarly situated reasonable litigant could have perceived some likelihood of success." *Id.* at 65 (emphasis added). This Court has held that the First Amendment protects petitioning absent an improper motive, understood as "activities not genuinely aimed at procuring favorable government action," see *City of Columbia v. Omni Outdoor Advertising, Inc.*, 499 U.S. 365, 380 (1991); But Bernardo's claims were struck although the uncontested evidence of record establishes that Bernardo's petition is filed for a wholly legitimate purpose and with no prospect of personal gain. The vicious penalty imposed for petitioning by means of C.C.P. §425.16 leaves no doubt that "[t]he cure has become the disease...." *See Navellier v. Sletten*, 29 Cal. 4th 82, 96, 124 Cal.Rptr.2d 530 (2002)(Brown, J. dissenting).

PPFA's effort to portray as "inappropriate" Bernardo's reliance on cases addressing the First Amendment bar to tort liability is just plain wrong. For one thing, this Court has emphasized that "[t]he right to petition is cut from the same cloth as the other guarantees of that Amendment, and is an assurance of a particular freedom of expression." *McDonald v. Smith*, 472 U.S. 479, 482 (1985); *see also BE&K Construction Co. v. NLRB*, 536 U.S. 516 (2002)(drawing on defamation law to discuss the protection required for the right to petition). Recognizing that "[t]hese rights are inseparable, *see McDonald*, 472 U.S. at 485, this Court has drawn from principles protecting other First Amendment activity when discussing the right to petition.

In *McDonald* this Court held that the First Amendment allowed the imposition of damages for improper petitioning where the state law required a showing of malice in terms "consistent with *New York Time Co. v. Sullivan*...." finding that heightened protection appropriate where petitioning addresses a matter of public concern. *Id.* at 485. In a similar vein, this Court struck down laws burdening petitioning on behalf of the public interest. *Button*, 371 U.S. at 429 (striking down non-solicitation laws as applied to the NAACP precisely because "the First Amendment...protects vigorous advocacy...against governmental intrusion"); *see also In Re: Primus*, 436 U.S. 412, (1978)(noting that "collective activity undertaken to obtain meaningful access to the courts is a fundamental right within the meaning of the First Amendment...."). And this Court has struck down burdens heaped on disfavored petitions that would, by this means, prevent courts from redressing grievances. *See Velazquez*, 531 U.S. 533, 547 (2001)(rejecting effort to strip petitioners of attorney where petitioner advanced disfavored claims).

Taken together these cases demonstrate that Bernardo's petitioning lies at the very core of First Amendment activity. It is directed at public figures who enter the public arena for the

purpose of informing consumers and others about their services and influencing public discussion. *See e.g. Garrison v. State of Louisiana*, 379 U.S. 64, 72-73 (1964)(striking down criminal libel law as applied to speech directed against public official because "where the criticism is of public officials and their conduct of public business, the interest in private reputation is overborne by the larger public interest, secured by the Constitution, in the dissemination of truth."); *Gertz v. Welch*, 418 U.S. 323, 344-47 (1974)(noting public figures place themselves in public forum "in order to influence the resolution of issues involved."). It addresses a matter of public concern, *i.e.*, the link between PPFA's services and the number one cancer cause of death for middle-aged women in America. *Cf. Gertz*, 418 U.S. at 344-47 (1974)(public figures, who have "thrust themselves to the forefront of particular public controversies in order to influence the resolution of issues involved...."); *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749 (1985)(distinguishing credit report from speech about matter of public concern for purpose of defining protection provided by First Amendment). It is advanced by women of the most modest means pursuant to a statute that authorizes suits on behalf of the general public and seeks relief that is designed to serve the public interest. *Cf. Button*, 371 U.S. at 429 (public interest litigation not simply "private litigation."); *In Re: Primus*, 436 U.S. at 428 (same). These features of Bernardo's petitioning indicate that it is entitled to the greatest measure of constitutional protection.

By the same token, these features of Bernardo's petitioning activity belie PPFA's implication that Bernardo's claims threaten fee–shifting in general. For the cases cited above demonstrate that the protection provided by the First Amendment turns in some measure on the connection between that activity and the common good. *See also U.S. v. National Treasury Employees Union*, 513 U.S. 454 (1995)(striking down ban on honorarium for speech by government employees

pursuant to traditional test extending protection to speech of government employees when made with respect to matters of public concern). This Court has already applied these principles to protect petitioning activity. *See McDonald*, 472 U.S. at 485 (recognizing that heightened protection on petitioning is appropriate where the petition addresses a matter of public concern with reference *New York Time Co. v. Sullivan*....). Moreover, the two part test for petitioning activity established in *Professional Real Estate, supra*, closely parallels the "actual malice" standard governing speech in *New York Times, supra*, which is really no surprise given that "these First Amendment rights are inseparable...." *See McDonald*, 472 U.S. at 485. In short, the recognition that Bernardo's petitioning is entitled to the highest level of constitutional protection does not necessitate a wholesale repudiation of fee-shifting statutes.

In any event, PPFA cannot avoid the merits of Bernardo's petition simply by repeating the label "fee-shifting." After all, it is fundamental that the protections provided by the First Amendment cannot be avoided by labels. *See e.g. Legal Services Corp.*, 531 U.S. at 547 (focusing on effect of restriction barring attorney's from advancing disfavored claims "lest the First Amendment be reduced to a simple semantic exercise."); *Button*, 371 U.S. at 429 (voiding use of law barring solicitation of legal business as applied to activities of NAACP and noting "a State cannot foreclose the exercise of constitutional rights by mere labels). And this Court has struck down burdens on protected activity even when labeled "fees" precisely because this Court focuses on substance not form. *See e.g. Forsyth County, Georgia v. The Nationalist Movement*, 505 U.S. 123 (1992)(permit "fee" fixed with reference to estimated costs of dealing with probable reaction to speech turned on content and violated First Amendment).

Finally, PPFA's effort to distinguish cases recognizing that the First Amendment limitation on liability for protected

activity on the grounds that the liability flows from a prior proceeding is feckless. As an initial matter, it is not true; *Professional Real Estate Investors*, for example, involved a claim for liability (including liability for attorneys fees and costs) advanced in the lawsuit that was litigated. More importantly, this "distinction" has nothing to do with the substance of the matter; It is no comfort that the fine imposed by C.C.P. §425.16 is levied sooner rather than later; and the illicit burden on petitioning cannot be insulated from review based on nothing more than timing. In sum, C.C.P. §425.16 is an impermissible burden upon Bernardo's fundamental right to petition for the reasons she has stated–and PPFA has failed to address.

B. Right To Due Process Of Law.

There is no question that Due Process guarantees Bernardo's fundamental right to access the courts for the purpose of petitioning. *See e.g. Tennessee v. Lane*, __U.S. __, 124 S.Ct. 1978, 1993-95 (2004) (citing precedent recognizing the right to "meaningful access to the courts" and noting that "failure to accommodate persons with disabilities will often have the same practical effect as outright exclusion"). As Bernardo's fate demonstrates, the "probability of success" standard imposed by C.C.P. §425.16 is nothing more than a subjective weighing of imponderables. As such, it exposes petitioners to all the vices associated with vague laws, most particularly, because it "abuts upon sensitive areas of basic First Amendment freedoms, it operates to inhibit the exercise of (those) freedoms." *Grayned v. City of Rockford*, 408 U.S. 104, 108-09 (1972); *see also Button*, 371 U.S. at 435-36 (striking down vague law barring solicitation of legal business because "[i]n such circumstances, a statute...may easily become a weapon of oppression, however evenhanded its terms appear."). Bernardo's case demonstrates that C.C.P. §425.16 has "the same practical effect as outright exclusion" by conditioning access to the courts on the ability to pay a fine

levied for failure to satisfy a "probability of success" standard that is meaningless as applied to litigation (and susceptible to abuse).

C.C.P. §425.16 also fails to provide the procedural protections required by Due Process before Bernardo can be stripped of her right to petition and fined for a supposedly improper use of her access to the courts. Precisely because Bernardo's petitioning activity addresses a matter of public concern and is directed at public figures, the party seeking to strike the complaint (and impose liability) must bear the burden of proving Bernardo's petitioning is subjectively and objectively baseless by clear and convincing evidence. *See Professional Real Estate, supra* (no liability for petitioning under Sherman Act absent showing by defendant that petition was objectively baseless); *McDonald*, 472 U.S. at 485 (recognizing that heightened protection on petitioning is appropriate where the petition addresses a matter of public concern with reference *New York Times Co. v. Sullivan*); *Cf. New York Times*, 84 S.Ct. at 283-97 (First Amendment bars liability for speech addressing matters of public concern requiring directed at public figure unless plaintiff proves actual malice or reckless disregard for the truth). Indeed, requiring the moving party to make this showing before it can secure dismissal of a petition (and impose fee liability) is especially appropriate because (as this Court has recognized) "the fact that [a suit] loses does not mean it is false. At most it means the plaintiff did not meet its burden of proving its truth. That does not mean the defendant has proved–or could prove–the contrary." *BE&K*, 536 U.S. at 532-33.

C. Right To The Equal Protection Of The Law.

PPFA's effort to avoid Bernardo's equal protection challenge to C.C.P. §425.16 with reference to the rational basis test is egregious. This Court has recognized "this right to petition as one of the most precious liberties safeguarded by the Bill of Rights," *see BE&K*, 536 U.S. at 524-25, and it is

elementary that classifications burdening fundamental rights must withstand strict scrutiny. *See e.g. Carey v. Brown*, 447 U.S. 455 (1980)(law favoring labor picketing violated Equal Protection); *Clark v. Jetter*, 486 U.S. 456 (1988)(six year limitation period for paternity actions did not withstand heightened scrutiny under Equal Protection Clause). In this regard, PPFA's reliance upon *Bovin v. Black*, 225 F.3d 36, 42 (1st Cir. 2000), is risible for the simple (and painfully obvious) reason that there is no fundamental right to recover attorneys fees. In contrast, Due Process does bar fees which, like those imposed by C.C.P. §425.16, burden the fundamental right to access the courts. *See Lane*, 124 S.Ct. at 1994 & n.21.

There is no question that C.C.P. §425.16 violates Bernardo's right to the Equal Protection of the law. By its terms C.C.P. §425.16 singles out (and burdens) a specific category of petitioning activity based on its content, *i.e.*, complaints about activity arguably protected by the First Amendment, thereby engaging in improper discrimination among protected activity. *Cf. City of Chicago v. Mosley*, 408 U.S. 92, (1972)(ordinance prohibiting all picketing but peaceful labor picketing violated equal protection by discriminating among persons based on nature of their First Amendment activity). In its operation, C.C.P. §425.16 discriminates against these disfavored petitions by imposing different burdens with respect to the motion to strike (production v. persuasion) and different risks of liability (prevailing party v. frivolousness), effectively rigging the judicial system against petitioners who complain about conduct on the part of the defendant arguably protected by First Amendment. *Cf. Forsyth County*, 505 U.S. 123 (ordinance making permit "fees" turn on content of speech violated First Amendment); *Simon & Schuster, Inc. v. Members of the New York State Crime Victims Board*, 502 U.S. 105 (1991)(law requiring accused or convicted criminals to escrow funds from books imposed financial burden based on content in violation of First Amendment). In its effect, C.C.P. §425.16 favors

defendants (the moving party on the motion to strike) over plaintiffs (the nonmoving party) with respect to their views concerning whether the defendant's pre–litigation activity is protected by the First Amendment or represents an unprotected abuse of First Amendment rights. *Cf. Velazquez*, 531 U.S. at 548 (rejecting burden on petitioners advancing disfavored views on lawfulness); *see also New York Times*, 376 U.S. at 283-84 ("The power to create presumptions is not a means of escape from constitutional restrictions."). This case illustrates the perverse effect of the statute: Bernardo has evidence that PPFA is engaged in false advertising (unprotected speech); But PPFA used C.C.P. §425.16 to stifle her claim (and punish Bernardo) based on nothing more than sheer assertion–assertions contradicted by its own words and actions. *See* Petition at 7-10.

Moreover, Bernardo's plight shows that C.C.P. §425.16 is in no way narrowly tailored. The statute is plainly over–inclusive to the extent that it sweeps within its scope petitioning activity that is not baseless by this Court's definition but merely unsuccessful in terms of C.C.P. §425.16. It is under–inclusive insofar as it does not extend to plaintiffs exercising their fundamental right to petition with the same procedural protections provided to defendants. It is downright arbitrary insofar as it allows defendants the benefit of the statute based on a mere burden of production (i.e. that the defendants' activity is protected by the First Amendment) while forcing plaintiffs to bear the burden of persuasion (i.e. that their petitioning is protected by the First Amendment); and it allows prevailing defendants to impose liability for (supposedly) improper petitioning–although the defendants have no burden to prove that the suit is baseless. This last point shows that PPFA's reliance on *Christenburg* is wholly mistaken: that case favors prevailing plaintiffs on the grounds that they establish a violation of federal law by meeting their burden of proof. *Christenburg*, 434 U.S. at 418-19. The exact opposite result

follows from C.C.P. §425.16 which allows defendants to prevail (and impose liability) although failure to satisfy C.C.P. §425.16 "does not mean the defendant has proved–or could prove–the contrary." *See BE&K*, 536 U.S. at 532-33.

Conclusion

This Court has struck down laws burdening the fundamental right to petition the courts for a redress of grievances based in part on its recognition that "under the conditions of modern government, litigation may well be the sole practicable avenue open to a minority to petition for redress of grievances." *Button*, 371 U.S. at 430. Likewise, this Court has struck down laws that burden disfavored petitions because such laws "prohibit[] speech and expression upon which courts must depend for the proper exercise of the judicial power" and "threaten[] severe impairment of the judicial function." *Velazquez*, 531 U.S. at 545. It is just so here. Who cannot see that Bernardo has been punished for wholly legitimate petitioning, and, in this way, the chill on petitioning that follows from C.C.P. §425.16? Who cannot see the evils that are possible if statutes can heap selective burdens on petitions which, because disfavored by the state, are singled out for hostile treatment. And who cannot see that if the label "fee-shifting" insulates all such burdens from review, then the right to petition will be reduced to a pious platitude for all but the most affluent litigants. Ultimately the common good will suffer; for it takes but a moment to bring to mind the many hallmark cases throughout our history that have greatly served the common good–but which, when filed, did not have a "reasonable probability of prevailing on the merits" by the measure of most men. For the reasons stated in Bernardo's papers, C.C.P. §425.16 burdens her constitutional right to petition, her right to due process of law, and her right to the equal protection of the law. This Supreme Court of the United States should grant her Petition and decide the vitally important questions of federal law that she presents for its review.

Respectfully submitted,

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